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In the Supreme Court of the United States

OCTOBER TERM, 1985

VICTOR K. EVANS, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner, a civilian employee of the Department of the Army who was demoted one grade level and transferred after he was found to have sexually harassed a subordinate female employee, principally argues that contacts between agency officials considering the charge against him invalidate his demotion.

1. a. In March 1983, Carol Patterson, a civilian employee of the United States Army Materiel Development and Readiness Command (DARCOM) in Lexington, Kentucky, brought formal charges of sexual harassment against petitioner, who was then her immediate supervisor. Patterson had previously complained to an Equal Employment Opportunity officer in October 1982 but had not filed formal charges (*Evans* v. *Department of the Army (Initial*

Decision), No. AT07528311109 (MSPB) Dec. 30, 1983), slip op. 21).[1] Patterson charged that petitioner made repeated sexual advances to her in 1981, despite her consistent attempts to rebuff him. She specifically alleged that petitioner made verbal and physical advances at hotels while petitioner and Patterson were traveling on government business, made frequent telephone calls to her home on evenings and weekends, and repeatedly called her into his office for "counseling" sessions at which he repeated these unwanted advances. Patterson also charged that, because she rejected his sexual advances, petitioner retaliated against her at work in various ways. Initial Decision 2-4.

Patterson's charges were investigated by the chief of the DARCOM headquarters Office of Equal Opportunity, who sent a report in March 1983 to Colonel Gracey, the commanding officer of the Lexington, Kentucky, facility. Colonel Gracey, the "proposing official," sent a notice of proposed removal to petitioner in May 1983 setting forth the charges summarized above. Petitioner's attorney filed a response to the charges with John Lockerd, petitioner's superior, who had been designated as the "deciding official." After reviewing the file, Lockerd found that the charges were supported by the evidence, but he reduced the proposed removal to a demotion from petitioner's supervisory GS-14 position to a non-supervisory GS-13 position. The demotion necessitated a transfer to DARCOM headquarters in Alexandria, Virginia. Initial Decision 1-4.

b. Petitioner appealed his reduction-in-grade to the Merit Systems Protection Board (MSPB). After discovery, a two-day evidentiary hearing, and post-hearing briefing and argument, the MSPB presiding official upheld the

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[1]We have lodged a copy of the Initial Decision with the Clerk of the Court.

charges of sexual harassment. Initial Decision 19. The presiding official credited Patterson's testimony that petitioner attempted to fondle her, "touching her breasts, waist and hips at various times," and concluded that petitioner's denials were not credible (*id.* at 5-9). However, he concluded that the charges of retaliation against Patterson were not adequately substantiated (*id.* at 17).

The presiding official rejected petitioner's claim that improper contact between the deciding official, Lockerd, and the proposing official, Colonel Gracey, tainted the proceeding. Specifically, petitioner complained because Lockerd, as petitioner's supervisor, was notified in October 1982 when Patterson first complained to the EEO office; that Lockerd was told by the investigators that Patterson's charges had merit; and that Lockerd advised Colonel Gracey, after he submitted his proposal that petitioner be removed, that the proposal did not contain sufficient information concerning the allegation that petitioner retaliated against Patterson (Initial Decision 21-22). The presiding official found no violation of petitioner's procedural rights, noting that there is no general proscription of appointing a deciding official who is familiar with the facts of a case (*id.* at 23). The presiding official specifically found that Lockerd had no actual bias against petitioner (*ibid.*).

The presiding official also rejected petitioner's "whistleblowing" claim. Petitioner alleged that the Army took disciplinary action against him in reprisal for writing his congressman to complain about mismanagement. Noting that petitioner sent the complaining letters shortly after he was informed of the sexual harassment charges, the presiding official concluded that petitioner "failed to demonstrate that there was any causal connection between his letters to his congressman and the agency action" (Initial Decision 25).

Because the charge that petitioner retaliated against Patterson was not sustained, and because of other mitigating factors, including petitioner's long record of service, the presiding official reduced the penalty to a 30-day suspension. Initial Decision 27.

c. On cross-appeals to the full MSPB, the Board reinstated the reduction-in-grade. Because "[s]exual harassment is an extremely serious type of misconduct" (Pet. App. 7), the Board found that the reduction-in-grade was a reasonable penalty (*id.* at 9). The Board dismissed petitioner's claim that there was improper contact between the proposing and deciding officials, as well as petitioner's argument that the presiding officer had not adequately explained his ruling that there was no procedural error. The Board "agree[d] with the presiding official's ultimate analysis of the issue and his conclusion that if any error did occur, [petitioner] was not harmed by it" (*id.* at 10).

The Board briefly addressed petitioner's argument that the claims against him were stale because they were brought 22 months after he made his sexual advances. The Board concluded that the agency moved promptly once formal charges were made and that petitioner "failed to show prejudice to his defense by the delay" (Pet. App. 10). The Board denied petitioner's other requests for review of the presiding official's decision.

d. The court of appeals affirmed in an unpublished opinion (Pet. App. 1-4). The court held that "the presiding official and the board correctly determined that no harmful procedural error occurred" (*id.* at 2). Citing *Welcker* v. *United States*, 752 F.2d 1577 (Fed. Cir. 1985), the court noted that the contacts between the proposing official and the deciding official were not contrary to any statute, regulation, or practice. Indeed, "petitioner has not denied that

the proposing and deciding official could be the same individual" (Pet. App. 3). The court rejected petitioner's other procedural challenges on the basis of the opinions by the Board and the presiding official and concluded that the penalty of demotion was reasonable (*id.* at 3-4).

2. The decision in this case is correct, presents no conflict among the circuits, and raises no significant legal issue. Accordingly, review by this Court is not warranted.

a. Petitioner's principal assertion is that the entire course of the proceedings against him is somehow tainted by the contacts between Lockerd and Colonel Gracey during the initial stages of the proceedings (Pet. 26-29). The court of appeals correctly recognized, however, that this case is squarely controlled by its recent decision in *Welcker,* in which the court concluded that there is no per se rule barring ex parte contacts among government officials involved in a personnel matter. Rather, the court held that prior cases established the principle that ex parte contacts invalidate a personnel action only where they occur in contravention of existing regulations, statute, or practice (752 F.2d at 1582-1583). In the present case, the court found that petitioner had made no showing of any such impropriety in the challenged contacts. In seeking review in this Court, petitioner does not assert that the Federal Circuit's *Welcker* rule, as applied in this case, is in conflict with a decision of any other court of appeals.[2] Nor has petitioner

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[2]Petitioner argues that *Welcker* is inconsistent with prior decisions of the Federal Circuit, notably *Sullivan* v. *Department of the Navy,* 720 F.2d 1266 (1983) (Pet. 28-29). The decision in this case is not inconsistent with *Sullivan.* In that case, the employee's supervisor, whom the court described as "a true adversary with motives of reprisal" (720 F.2d at 1272) because the employee had recently filed a grievance against him, repeatedly urged the deciding official to remove the employee. This case is quite different, because there is no adversary with motives of reprisal since there is no merit to petitioner's whistleblowing claim. In addition, in *Welcker,* the court of appeals distinguished *Sullivan,*

attempted to show that he was prejudiced by the contacts that he alleges invalidate his demotion. In these circumstances, review is not warranted.

b. The other issues raised by petitioner do not merit review either. Petitioner asserts that the charges against him were stale (Pet. 29-30), even though the investigation was completed within two weeks of the filing of Patterson's formal complaint and a notice of proposed action was forwarded to him within two months thereafter. As the MSPB pointed out in its decision, petitioner has made no showing of prejudice from any delay. Nor is there any merit to petitioner's assertion that he "established a *prima facie* case of whistleblowing activities" and that the Army was required to "rebut this evidence" (Pet. 30-31). As the presiding official concluded, petitioner's letters to his congressman, which appear to have been an obvious attempt to construct a whistleblowing claim, did not lead to his demotion. Initial Decision 25.[3]

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noting that the court there evidently believed that the ex parte contacts at issue were clearly barred by applicable regulations, statute, or practice. 752 F.2d at 1583 n.3. Here, in contrast, the court found no violation of a regulation, statute, or practice. In any event, even if there were an inconsistency among the precedents of the Federal Circuit, such an issue would be appropriate for rehearing before that court en banc, not review before this Court. Petitioner did not seek rehearing en banc in this case.

[3]Petitioner lists two additional "questions presented for review" that are not discussed in his petition. Petitioner asserts that the presiding official erred, in his written decision, by reversing his prior oral "ruling" regarding petitioner's claim of ex parte contacts (Question B, Pet. ii). However, both the court of appeals and the MSPB found, after reviewing the hearing transcript, that the presiding official had not decided the issue but had simply taken the question under advisement (Pet. App. 2, 9-10). Petitioner also questions whether an adverse personnel action may be supported by hearsay evidence (Question D, Pet. iii). The court of appeals correctly held that written statements may be relied upon in administrative determinations, despite their hearsay character (Pet. App. 3). See *Richardson* v. *Perales*, 402 U.S. 389, 402 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

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